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No. 82-594

IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM 1982

INTERSTATE COMMERCE COMMISSION,
PETITIONER

v.

RITTER TRANSPORTATION, INC., ET AL.,
RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF PORT NORRIS EXPRESS CO., INC., IN OPPOSITION TO PETITION

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QUESTIONS PRESENTED

Does the decision below, which requires findings in restriction removal proceedings on an applicant's fitness to provide service, have a significant or recurrent impact on the administrative processes of the Interstate Commerce Commission? Are the issues raised by petitioner therefore important enough to warrant this Honorable Court's consideration?

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STATEMENT

In March 1981, Port Norris Express Co., Inc. (Port Norris),[1] applied

1. Port Norris has no subsidiary or affiliate corporations. Neither is Port Norris a subsidiary of any other corporation.

under regulations published by the Interstate Commerce Commission (the Commission) at 49 CFR Part 1137[2] to broaden the restrictive commodity description "cullet, in bulk" contained in its certificate No. MC-110841, Sub No. 16, to the description "commodities in bulk." Port Norris submitted in support of its application all of the information required by 49 CFR 1165. That information did not include direct evidence demonstrating Port Norris' fitness, willingness and ability to transport commodities in bulk.

Comments on Port Norris' application were filed by Schwerman Trucking Company and Ritter Transportation, Inc. (Rit-

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2. Renumbered as 49 CFR 1165 by decision of the Interstate Commerce Commission in Ex Parte No. 55 (Sub-55), Revision and Redesignation of Rules of Practice, 47 Federal Register 49534 (November 1, 1982). These regulations will be referred to hereinafter by their new numerical designation.

ter). Port Norris replied to those comments.

By decision served June 5, 1981, the Commission's Restriction Removal Board granted Port Norris' application. While finding that Port Norris' evidence demonstrated that various public benefits would result from a grant of the application, the Restriction Removal Board did not make any findings concerning Port Norris' fitness, willingness and ability to provide service under the broadened grant of authority.

Ritter appealed the Restriction Removal Board's decision to a division of the Commission. The division rejected the appeal, finding that Ritter had not shown extraordinary circumstances warranting its consideration. Ritter then brought suit in the United States Court of Appeals for the District of Columbia

Circuit, seeking reversal of the Commission's action.

By decision entered July 27, 1982, the United States Court of Appeals for the District of Columbia Circuit reversed the Commission's action in granting Port Norris' request for broadening of its authority. The Court held that the Commission's challenged action was arbitrary because the Commission had failed to consider whether Port Norris was fit, willing and able to provide service under the broadened authority sought, thus ignoring a relevant factor in making its finding that the broadening granted was a reasonable broadening. Petitioner then filed the instant petition for writ of certiorari.

ARGUMENT IN OPPOSITION TO PETITION

Port Norris supported the Commis-

sion's position in the court below and continues to believe that the decision below was incorrect. However, Port Norris opposes the Commission's petition.

The issues presented are not significant. Port Norris disagrees with the Commission's interpretation that the decisions in Ritter Transportation, Inc. v. Interstate Commerce Commission, 684 F.2d 86 (D.C. Cir. 1982), and Steere Tank Lines, Inc. v. Interstate Commerce Commission, 666 F.2d 255 (5th Cir. 1982), require an applicant for restriction removal to prove fitness, willingness and ability to transport each and every commodity encompassed by a particular commodity description. Rather, Port Norris believes that a showing of fitness, willingness and ability to transport most of the commodities encompassed by a description would suffice. And since an elaborate showing of fitness, willingness and

ability to provide service is not necessary (Ritter Transportation v. ICC, 684 F.2d, at 88, Steere Tank Lines v. ICC, 666 F.2d, at 258), requiring the Commission to make fitness findings would put little regulatory burden on applicants and little additional administrative responsibility on the Commission. The Commission currently makes fitness findings in restriction removal proceedings, and has not demonstrated that making such findings has increased its administrative burden substantially.

The issues presented also have little significance because they are unlikely to recur. The number of restriction removal applications filed has fallen off sharply in recent months, causing the Commission to abolish its special Restriction Removal Board. See: Ex Parte No. MC-142 (Sub-No. 1), Removal of Restrictions from Authorities of Motor

Carriers of Property, (unprinted; Entire Commission), served December 13, 1982. [See Appendix A to this Brief.]

This decline in the number of restriction removal applications is likely to continue. Only authorities issued as a result of applications filed prior to December 28, 1980, may be revised under restriction removal regulations. 49 CFR 1165.2. [See Appendix B to this Brief.] Thus, the pool of authorities containing removable restrictions shrinks with each restriction removal application. It is likely, therefore, that processing restriction removal applications will continue to become an even less significant portion of the Commission's regulatory activities.

CONCLUSION

WHEREFORE, the foregoing consid-

ered, Port Norris prays that this Honorable Court deny the petition for writ of certiorari filed by the Commission.

Respectfully submitted,

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Port Norris Express
Co., Inc.

APPENDIX A

EC
FR-7035-01

SERVICE DATE
December 13, 1982

INTERSTATE COMMERCE COMMISSION

49 CFR PART 1165
EX PARTE NO. MC-142 (Sub-No. 1)

REMOVAL OF RESTRICTIONS FROM AUTHORITIES OF MOTOR CARRIERS OF PROPERTY

AGENCY: Interstate Commerce Commission

ACTION: Final rules.

SUMMARY: The Commission is eliminating the special Restriction Removal Board. On January 15, 1981 (45 FR 3532), the Commission published notice of the establishment of a special Restriction Removal Employee Board. This Board has been delegated the functions set forth in 49 CFR 1011.6(1), which was added in that document. Under that section, the Board decides applications seeking to remove operating restrictions or to broaden unduly narrow authority in existing certificates and permits under the provisions of 49 CFR Part 1165 (formerly Part 1137). Although carriers may continue to avail themselves of the restriction removal procedures, the Commission has determined that the level of application filings no longer warrants the use of a special employee

board. Restrictions removal proceedings will be referred to the employee review boards of general jurisdiction for determination, as provided for at 49 CFR 1011.6(f).

EFFECTIVE DATE: December 20, 1982

COMMENTS: Since this is a final action taken to revise internal organizational matters, provisions for formal comments are unnecessary under 5 U.S.C. 553 (b)(A).

FOR FURTHER INFORMATION CONTACT:

Howell I. Sporn
(202) 275-7691

SUPPLEMENTARY INFORMATION:

SUMMARY

We are adopting the procedural rule set forth in the appendix.

This action is taken under the authority of 49 U.S.C. §10321 and 5 U.S.C. §553.

Decided: December 6, 1982.

By the Commission, Chairman Taylor, Vice Chairman Gilliam, Commissioners Sterrett, Andre, Simmons, and Gradison. Commissioner Sterrett was absent and did not participate.

AGATHA L. MERGENOVICH
(SEAL) Secretary

Ex Parte No. MC-142 (Sub No. 1)

APPENDIX

49 CFR 1011 is amended by removing 49 CFR 1011.6(1).

APPENDIX B

49 CFR 1165.2 Applicability of rules.

Applications may be filed under these rules to remove restrictions or to broaden authority in certificates and permits issued pursuant to applications filed before December 28, 1980.